



Supreme Court, U.S.  
FILED

No. \_\_\_\_\_

05-328 FEB 5 - 2003

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**In The  
Supreme Court of the United States**

LEON C. BAKER P.C., and LEON C. BAKER,

*Petitioners,*

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari  
To The Supreme Court  
Of The State Of Alabama**

**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

1. May an Alabama court enjoin proceedings in a Florida court?
2. May an Alabama court enjoin an arbitration in Florida ordered by a Florida court?
3. Is the ruling of this Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), that arbitrators and not courts should rule on affirmative defenses to claims in arbitration, limited to defenses in the nature of the statute of limitations?

**PARTIES TO THE PROCEEDING**

The caption contains the names of all of the parties to this proceeding.

**CORPORATE DISCLOSURE STATEMENT**

Leon Baker P.C. ("the P.C.") is a New York professional corporation, authorized to practice law in that state. All of its shares are owned by Leon C. Baker ("Baker"), a lawyer authorized to practice in New York and Florida. The P.C. is not authorized to practice law in Florida or Alabama.

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## **OPINIONS BELOW**

The Alabama Supreme Court affirmed the injunction. No opinions were issued by the Alabama trial court or by the Alabama Supreme Court. Three of the nine justices of the Alabama Supreme Court, however, dissented, but also without any opinions. Copies of the Alabama trial court and Alabama Supreme Court Orders are set forth commencing at Page App. 1 of the Appendix.

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## **STATEMENT OF THE BASIS OF JURISDICTION**

The decision of the Alabama Supreme Court was released on December 17, 2004 and received by P.C.'s counsel by mail on December 20, 2004. This petition was filed less than ninety days after the release of the Alabama Supreme Court's decision.

The Agreement between the P.C. and Merrill Lynch containing the arbitration provision relates, among other transactions, to the trading of stocks and other securities on exchanges engaged in interstate and foreign commerce. The Federal Arbitration Act (9 U.S.C. § 2) applies to the arbitration agreement in this case.

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**FEDERAL CONSTITUTIONAL AND  
STATUTORY PROVISIONS INVOLVED**

**CONSTITUTIONAL**

U.S. Const. art. I, § 8, cl. 3, provides in pertinent part:

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. IV, § 1, provides in pertinent part:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State.

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**STATUTORY**

**Federal Arbitration Act**

**9 U.S.C. § 2: Validity, Irrevocability, and Enforcement of Agreements to Arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

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### STATEMENT OF THE CASE

The P.C. opened a securities brokerage account with Merrill Lynch's Miami, Florida office. It signed Merrill Lynch's standard form of brokerage agreement, which provides that all disputes between the parties they cannot resolve shall be submitted to binding arbitration.

Many years later a dispute arose which the parties were unable to resolve. The P.C. sued Merrill Lynch in a Florida court, but when reminded of the arbitration provision, the P.C. agreed to the Florida court's entry of an order demanded by Merrill Lynch providing for arbitration. The Florida court reserved jurisdiction to enforce the award of the arbitrators and as to any other matters which might arise with respect to the arbitration.

As noted above, the P.C. and Merrill Lynch went forward with the arbitration as ordered by the Florida court to the point of trial. Then Merrill Lynch had second thoughts. It no longer wanted the dispute resolved by arbitration nor to have it tried in Florida. Merrill Lynch went to Alabama and obtained an injunction against the arbitration ordered by the Florida court. Merrill Lynch asserted 1) that it had an affirmative defense of *res judicata*<sup>1</sup> to the P.C.'s arbitration claim and 2) that such a defense should be ruled on by a court. These events transpired before this Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

In *Howsam*, this Court barred the intervention by courts to rule on alleged affirmative defenses in disputes

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<sup>1</sup> Actually the supposed "defense" would be collateral estoppel, not *res judicata*. Moreover, the P.C. was not a party to the proceeding in which the "defense" was alleged to have arisen and is not bound by it, whichever it might be.

which the parties have agreed to submit to arbitration. This Court subsequently denied the P.C.'s prior petition for certiorari to the Alabama Supreme Court, apparently because *Howsam* had resolved the principal legal issue that the P.C.'s earlier petition had raised.

In fact, however, the issue is far from resolved, because Merrill Lynch will not take "No" for an answer. It reads the decision in *Howsam* as very narrow, so narrow that *Howsam* would not apply to this case (or too many others either). Merrill Lynch asserts that *Howsam* is restricted to the very unusual type of defense which was before this Court in *Howsam*, based on a rule of the National Association of Securities Dealers, not a statute.

In arguing that *Howsam* is limited to precisely that type of defense, Merrill Lynch ignores that in *Howsam* this Court cited its earlier decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), which specified as among defenses to be ruled on by arbitrators "waiver, delay or a like defense." Merrill Lynch also disregards that in *Howsam* this Court cited, with approval, the Revised Uniform Arbitration Act of 2002, RUAA § 6(c), and comment 2, 7 U.L.A. 12-13 (Supp. 2002), which specifies that arbitrators should rule on affirmative defenses "such as time limits, notice, laches, estoppel and other conditions precedent." This issue as to the breadth of *Howsam* is common to both this petition and the related petition styled *Leon C. Baker P.C. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, on petition from a Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida.

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## REASONS FOR GRANTING THE WRIT

Petitioners, Leon C. Baker, P.C. ("the P.C.") and Leon C. Baker ("Baker"), pray that a Writ of Certiorari be issued to review a judgment of the Supreme Court of Alabama which became final on December 17, 2004. (*See App. 1*).

This is the second Petition for Writ of Certiorari in this case. The earlier petition was filed more than two years ago. Shortly after the prior petition was filed, the major issue it raised was resolved favorably to petitioners' contentions, but in another case. That case was *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79 (2002), in which this Court ruled that arbitrators, and not courts, should rule on affirmative defenses to claims the parties have agreed to submit to arbitration. Since the issue had been ruled on, certiorari then appeared unnecessary in petitioners' case.

There remained, however, a differer<sup>+</sup> unresolved issue. The P.C. and Respondent, Merrill Lynch, had submitted their dispute to arbitration in Florida pursuant to an order of a Florida court.

The parties had, in Florida, exchanged pleadings and selected a panel of three lawyers as arbitrators. Just before the Florida arbitration trial was to go forward, however, Merrill Lynch unilaterally obtained from an Alabama court an injunction enjoining the arbitration the Florida court had ordered. As is set forth below, this is the Full Faith and Credit issue presented by this petition.

### I. THE RELATED PETITION FOR CERTIORARI

This case is closely related to an earlier case solely between the P.C. and Merrill Lynch, in which Merrill